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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1945

No. ~~603~~ 607

FRANK SMREKAR, JR., a minor, by Frank Smrekar, Sr., his guardian ad litem,
Petitioner,

vs.

BAY AND RIVER NAVIGATION COMPANY (a corporation), and BLACK COMPANY (a corporation),
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the District Court of Appeal, State of California, First Appellate District, Division One.

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PETITION FOR WRIT OF CERTIORARI
to the District Court of Appeal, State of California,
First Appellate District, Division One.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Frank Smrekar, Jr., a minor, by Frank Smrekar, Sr., his guardian ad litem, respectfully prays for a writ of certiorari to the District Court of Appeal, State of California, First Appellate District, Division One, to review the final judgment of said Court, entered June 22, 1945, affirming the judgment of the Superior Court of the State of California, in and for the City and County of San Francisco.

OPINIONS BELOW.

No opinion was rendered by the Supreme Court of the State of California. (R. 28.) The opinion of the District Court of Appeal, State of California, First Appellate District, Division One, is contained in the record. (R. 17-26.) It is printed in 69 Advance California Appellate Reports 900.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner, while on a vessel in navigable waters and while acting in the course and scope of his employment received injuries for which he brought an action at law in the Superior Court of the State of California, in and for the City and County of San Francisco, against his employer under provisions of the

Jones Act (March 4, 1915, c. 153, Sec. 20, 38 Stat. 1185; June 5, 1920, c. 250; 46 U. S. C. A., Sec. 688.)

The answer of the employer, respondent Bay and River Navigation Company (a corporation), set up as a special defense that petitioner's remedy was under the Longshoremen's and Harbor Workers' Compensation Act (March 4, 1927, c. 509, Sec. 2, 44 Stat. 1424) 33 U. S. C. A., Section 902, paragraph 3, which reads:

> "The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

The trial upon said special defense was by the Court and judgment was rendered thereon in favor of respondent on March 21, 1944. (R. 15.)

Petitioner appealed to the District Court of Appeal, State of California, First Appellate District, and the judgment was affirmed by Division One of said Appellate Court on June 22, 1945. (R. 17-26.)

Petitioner then petitioned for a hearing by the Supreme Court of the State of California. (R. 27.) The petition was denied without an opinion on August 16, 1945. (R. 28.)

Remittitur was sent down August 22, 1945. (R. 29.)

JURISDICTION.

Jurisdiction of this Court is invoked under Section 237 B amended of the Judicial Code. (28 U. S. C. A., Sec. 344.) The questions were properly raised before the highest Court in the State.

STATEMENT OF FACTS.

The facts have been stated in the opinion of the District Court of Appeal. (R. 22.)

QUESTIONS PRESENTED.

1. Was petitioner on the date of his injury a member of a crew or a longshoreman?

2. Has the basic right and privilege given under Section 688 of the Jones Act and claimed by petitioner as a seaman and member of a crew been denied him?

3. Are the legal principles enunciated by this Court in *Norton v. Warner Co.*, 321 U. S. 565 (64 S. Ct. 747, 88 L. Ed. 931), its latest decision on this exact question, to be applied to cases arising under said section of the Jones Act or may the State Courts apply the legal principles enunciated by prior decisions of the Federal Courts given when reviewing deputy commissioners' decisions involving the construction of the sections of the Longshoremen's Act quoted supra?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(1) The District Court of Appeal, State of California, ~~Third~~ First Appellate District, Division One, has decided a federal question of substance in a way not in accord with the latest applicable decision of this Court.

The District Court of Appeal in affirming the judgment of the Superior Court based its reasoning on the premise that the answer to the question involved depended upon and was concerned with the actual duties of navigation—that is the technicalities and mechanics of navigation—the "putting over the helm". In doing so it based its decision upon *Pacific Employers Insurance Company v. Pillsbury,* 131 Fed. (2d) 21, which in turn was based on this Court's decision in *South Chicago Coal & Dock Co. v. Bassett,* 309 U. S. 251 (60 S. Ct. 544, 84 L. Ed. 732).

Petitioner asserts that the District Court of Appeal failed to give the proper effect to this Court's decision rendered in *Norton v. Warner Co.,* supra.

Petitioner submits that this Court therein applied an entirely different premise and process of legal reasoning in deciding the exact question herein involved. From it and the cases cited and approved therein petitioner contends that this Court based its decision on the premise that the term navigation is not limited to "putting over the helm", but also embraces duties essential for other purposes of the vessel. That the question does not concern the employee's actual duties but whether those duties were of a permanent nature and

for the benefit of the vessel, subject to the captain's orders and whether he had a right to look to the vessel for payment for the performance of those duties.

(2) The decision of the District Court of Appeal is untenable and should not be permitted to stand as a precedent.

The unmistakable effect of the decision of the District Court of Appeal is to permit rulings of administrative officials to destroy a basic right given under the Jones Act.

This Court has repeatedly held that the deputy commissioners' decisions cannot be set aside by the Courts because they are deemed to be against the weight of the evidence.

Cooks, surgeons, coopers, bartenders, wireless operators and clerks have been held by this Court to come within the purview of the Jones Act. And when suit has been brought under the Jones Act the test has been whether the services are for the benefit of the vessel.

This Court said in *Norton v. Warner Co.,* supra, that the Jones Act and the Longshoremen's Act are mutually exclusive federal systems.

Then why should an employee who has claimed his basic right under the Jones Act be refused this right on a different process of reasoning occasioned simply because some of his duties entailed work in the nature of that of a longshoreman?

Petitioner believes that this Court in *Norton v. Warner Co.,* supra, said that in the determination of

this exact question the same process of legal reasoning should apply without regard to which one of the federal systems the question first arose.

Petitioner also believes that the *Norton v. Warner Co.*, supra, decision secured a harmony of decision and the appropriate settlement of a question of general importance so that the two mutually exclusive federal systems may be uniformly administered.

CONCLUSION.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued to the District Court of Appeal, State of California, First Appellate District, Division One, and that the final judgment of said Court in said cause be reviewed and reversed.

Dated, San Francisco, California,
November 1, 1945.

THOS. J. RIORDAN,
Counsel for Petitioner.

A. L. CRAWFORD,
RALPH BANCROFT,
Of Counsel.

(20)

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vs.

BAY AND RIVER NAVIGATION COMPANY (a corporation), and BLACK COMPANY (a corporation),
Respondents.

BRIEF FOR RESPONDENT, BAY AND RIVER NAVIGATION COMPANY AND REQUEST FOR DENIAL OF PETITION FOR WRIT OF CERTIORARI.

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Respondents.

BRIEF FOR RESPONDENT, BAY AND RIVER NAVIGATION COMPANY AND REQUEST FOR DENIAL OF PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Respondent, Bay and River Navigation Company, respectfully prays that the request for writ of certiorari in the above matter be denied forthwith.

STATEMENT OF CASE.

Petitioner contends the Jones Act applied at the time of injury, and it did not come under the purview of the Longshoremen's and Harbor Workers' Compensation Act. (Title 33, Art. 1, 901 et seq.; 33 U.S.C., U.S.C.A., Section 901 et seq.)

The question goes entirely to jurisdiction and is whether or not Mr. Smrekar was a member of a crew and came under the Jones Act or was a stevedore or harbor worker whose primary duty was to unload and load a vessel when in port, and supervise the work of others hired to do such loading and unloading.

CONTENTIONS OF RESPONDENT.

It is contended petitioner Smrekar was primarily aboard the Steamship M. V. Komoku to load and unload it when docked and to supervise the work of others hired to do such work. The primary reason for his being aboard was not to aid in or facilitate navigation, and at the time of injury, he was not engaged in navigation.

The Court found, as we contend, the Jones Act did not apply, and found that for any benefits to which Mr. Smrekar might be entitled he should look to the Longshoremen's and Harbor Workers' Compensation Act.

It is contended further whether or not there was jurisdiction under the Longshoremen's Act is a question of fact, and if there was evidence to support the conclusion of the Court the decision must stand.

Norton v. Warner Co., 321 U. S. 565, 64 Sup. Ct. 747, 88 L. Ed. 931, is in no way inconsistent with or contrary to the decision.

CONTENTIONS OF PETITIONER IN THE COURTS BELOW.

In the Courts below petitioner contended *Vojkovich v. Ursick*, 49 Cal. App. (2d) 268, and *Occidental Indem. Co. v. I.A.C.*, 24 A.C.R. 305, and *O'Donnell v. Great Lakes Dredge and Dock Co.*, 87 L. Ed. 596, and *Norton v. Warner Co.*, 88 L. Ed. 606, supported his contention the Jones Act alone applied. He now solely relies on *Norton v. Warner*, supra, and says the decision at bar is contrary to it.

In considering the contentions of petitioner it must be remembered the Court found Smrekar was neither a seaman nor a member of the crew.

STATEMENT OF FACTS.

Petitioner has adopted the findings of fact as stated in the opinion of the Court below wherein it was found Mr. Smrekar was not an able seaman or a member of the crew but a stevedore and worker who was primarily aboard to load and unload the boat when it docked and to supervise the work of others hired to do loading and unloading. The evidence showed and it was found the primary reason for his being aboard was not to aid or facilitate such steamship in its navigation, and he was not engaged in navigation at the time of the injury. The Court further pointed out the pri-

mary duty of Mr. Smrekar was to discover sacks of sugar that had been damaged and to replace them whether they be on a truck, the dock, or cars loaded. He would do this by taking sacks from a reserve, maintained for that purpose. He was required to fill out reports concerning this, and did his paper work while the boat was in motion. After performing these duties he had none other to perform until the boat docked the next morning. He slept aboard except Saturdays and was paid a monthly salary. He participated in loading and unloading by checking the sacks, and while unloading was in progress saw to it that sugar was placed in the proper railway cars by the jitney drivers, and directed them to the proper railroad cars in which to place their loads.

He had no a.b. seaman's license and was not required to have one although he had a seaman's certificate of identification and a seaman's certificate of service. At the time of injury he was bringing up damaged sacks on the ship's elevator to replace those damaged in railway cars on the land.

QUESTIONS PRESENTED BY PETITIONER.

To the Courts below it was contended Mr. Smrekar was a seaman while it is contended to your Court that he was a member of the crew and therefore came under the Jones Act. It is claimed because of *Norton v. Warner,* supra, the decisions of the Superior, Appellate and Supreme Courts of the State of California were contrary to law, and they acted in excess of their jurisdiction.

Petitioner says the question does not concern the employee's actual duties but whether his employment was of a permanent nature, and for the benefit of and subject to the Captain's orders, and because he had a right to look to the vessel for payment for the performance of his duties. He contends the decision of the Court below should not be permitted to stand, and that one claiming under the Jones Act should not be refused the right of independent suit because some of his duties are in the nature of those of a longshoreman.

For support in law petitioner says the decision is entirely incorrect because of the case of *Norton v. Warner Co.,* supra, and relies entirely upon it.

ANSWER TO CONTENTIONS AND AUTHORITIES OF PETITIONER.

The Warner case.

Norton v. Warner, supra, also known as the *Rush In* case, is where a bargeman who lived aboard and operated it alone was found to be a seaman and not a harbor worker. The Court said the determinative factors were the duties he was called upon to perform, and the circumstances under which he was required to perform them, and where such duties pertained to the welfare and operation of the vessel, the employee was a seaman. It said, on the other hand, if the employee is concerned primarily with the loading and the unloading of a vessel, he is a harbor worker and not a seaman and the Longshoremen's Act applies.

The evidence shows, and the Court found, that Mr. Smrekar was primarily concerned with the unloading

of the vessel and had no duties to perform in connection with navigation and was performing none at the time of his injury. It is therefore submitted the case of *Norton v. Warner* is not in point for petitioner but clearly supports the Courts below.

O'Donnell v. Great Lakes Dredge & Dock Co., 87 L. Ed. 596, holds a seaman may be either a stevedore or a member of the crew, and if not a member of the crew, the Longshoremen's Act is exclusive. All seamen are not members of the crew. See *Osland v. Star Fish and Oyster Co.*, 107 Fed. (2d) 113, and *Domandich v. Doratich*, 165 Wash. 315.

Also see *Pac. Emp. Ins. Co. v. Slawson*, 130 Fed. (2d) 24, and *Puget Sound Freight Lines v. Marshall*, 125 Fed. (2d) 876.

Prior to *Southern Pacific v. Jensen*, 244 U. S. 205, State compensation benefits were given to stevedores injured aboard vessels. Thereafter there was the passage of the Merchant Marine Act and the Longshoremen's and Harbor Workers' Act, and then came the opinion of your Honorable Court in *Nogueira v. New York, H. H. and H. R. Co.*, 281 U. S. 129, where it was stated the Merchant Marine Act of 1920 gave to seamen the rights and remedies which were applicable to railroad employees. There, however, your Court said:

> "Longshoremen engaged on a vessel at dock in navigable waters, in the work of loading or unloading, have been held to be seamen * * * But seamen, including longshoremen engaged in loading or unloading, if injured on a vessel in navigable waters, could not constitutionally have the benefit of a state workmen's compensation act, even if an act of Congress so provided."

In support of the foregoing also see *Southern Pacific Co. v. Locke,* 1932 A.M.C. p. 1444; *Seneca Washed Gravel Corp. v. McManigal,* 65 Fed. (2d) 779; *DeWald v. Baltimore & Ohio R.R.,* 71 Fed. (2d) 810; *Diomede v. Lowe,* 14 Fed. Supp. 380; *South Chicago Coal & Dock Co. v. Bassett,* 104 Fed. (2d) 1158, approved by your Honorable Court.

All of the foregoing show and hold that a seaman is not necessarily a member of the crew and that a deckhand is not a member of the crew and is entitled to longshoremen's benefits.

The question if one is a member of a crew is a question of fact. There is clearly evidence to support the decision in the Courts below, and that being the case, the decision must stand. In such cases as this, a finding of fact, if supported, is conclusive. See *Henderson v. Glens Falls,* 1943 A.M.C. 746; *Bowen v. Shamrock Towing Company,* 1944 A.M.C. 39.

NO SPECIAL OR IMPORTANT REASON FOR GRANTING THE PETITION APPEARS.

None of the reasons for granting the petition as provided in Rule 38, subdivision 5, appear.

The Courts below did not decide an important question of federal law not settled by this Court. They did not depart from the accepted and usual course of judicial proceedings and no Circuit Court of Appeals decision is involved.

CONCLUSION.

The foregoing contentions, statements and citations of law show the Jones Act does not apply in the case at bar.

All seamen do not come under the Jones Act and the Longshoremen's Act restricts the Jones Act.

The decision is based on adequate evidence and is final.

Norton v. Warner, supra; *South Chicago Coal* case, supra, and *Puget Sound Freight Lines,* supra all show there is no legal or adequate ground upon which petitioner can stand.

To say the *Norton* case applies would be overruling the *South Chicago Coal* case. The *Norton* case held where one was called upon to perform duties which pertained to the welfare and operation of a vessel, he was a seaman, but it did not say under such circumstances he was a member of the crew. It does say, however, if one is employed primarily for the loading and unloading of a vessel he is a harbor worker and not a seaman, and we say therefore not a member of the crew even if a seaman. One does not include the other.

The law and facts support the decision which is consistent with all the pertinent decisions including that of *South Chicago Coal Co.,* supra.

No error has been shown in the decisions of the Courts below and therefore they should remain final.

The decision of the Court below is not contrary to previous decisions of your Honorable Court. As a

matter of fact, the doctrine of the *South Chicago Coal Co.* case applies. There was no contention the decision was contrary to it and *Norton v. Warner* gives no support to petitioner.

The holding in *Norton v. Warner* is not inconsistent with the facts herein but goes to a different application.

No new, novel, unconstitutional or contradictory decision exists to warrant a hearing before your Honorable Court, and there has been no showing the matter falls within the rules of your Court herein pertinent.

The petition for writ of certiorari should be denied.

Dated, San Francisco, California,
December 12, 1945.

Respectfully submitted,
W. N. MULLEN,
Attorney for Respondents.

Due service and receipt of a copy of the within is hereby admitted

*this*_____*day of December, 1945.*

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Attorneys for Petitioner